



**Mwagambo (Suing for and on Behalf of the Estate of Chilango Mwagambo  
Mwakiti - Deceased) v Haro & another (Environment and Land Appeal  
E001 of 2024) [2025] KEELC 6485 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6485 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
FM NJOROGE, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**NELSON GAMBO MWAGAMBO ..... APPELLANT  
SUING FOR AND ON BEHALF OF THE ESTATE OF CHILANGO MWAGAMBO  
MWAKITI - DECEASED**

**AND**

**CHILANGO KARISA HARO ..... 1<sup>ST</sup> RESPONDENT  
KINGI KARISA HARO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Judgment and Order of Hon. J.M Kituku  
(SPM) delivered on 19/12/2023 in Kilifi SPMCC ELC NO. E034 of 2022)*

**JUDGMENT**

1. The Appellant herein being aggrieved by the judgment of Hon Kituku, SPM, delivered on 19/12/2023 filed a Memorandum of Appeal dated 11/1/2024 challenging the judgment on the following grounds: -
  1. The learned Magistrate erred in law and in fact by finding that the defendants' occupation of the suit property on plot number 111 Tezo Roka Settlement Scheme (the suit property) has been uninterrupted despite overwhelming evidence that the defendants were only allowed to stay on the property by the Plaintiff's brother but to look for their own property to relocate therefrom;
  2. The learned Magistrate failed in law and fact by disregarding the plaintiff's evidence that the defendants were only allowed temporary stay on humanitarian grounds and all along have been aware that the land belonged to the plaintiff's brother going by the adjudication records;



3. The learned Magistrate failed in law and fact by disregarding and putting a blind eye to the overwhelming evidence that the defendants had already lost their mother and father and were not buried on the Plaintiffs suit property but rather else where and so there were no compelling reasons or evidence to allow the burial on the suit property;
  4. The learned Magistrate erred in law and facts by permanently barring the appellant and his servants or relatives from interfering with the suit property by totally misapplying the principles in granting of injunctions and equitable remedies;
  5. The learned Magistrate erred in law and fact by disregarding the evidence that the defendants were staying on the land with specific and clear instructions on their stay by not planting any permanent trees and by not putting up permanent and in fact the buildings put thereon were during the existence of the suit;
  6. The learned Magistrate erred both in law and in fact by disregarding the evidence especially to the effect that the defendants' father was welcomed by the Plaintiff's father in 1987 yet the learned Magistrate found that it is not the Plaintiffs father who was allotted the land by way of documentation yet either party produced any ownership documents;
  7. The learned Magistrate finding on the judgment was not only contradictory but biased since he failed to consider the evidence that the deceased Fatuma Karisa Haro's husband passed on and the remains were interred elsewhere not on the suit land;
  8. That the learned Magistrate erred in law in awarding the defendants Kshs. 7500 and 500 per day for mortuary charges from 26/10/2021 to be paid by the appellant yet the defendants had all the time to bury the deceased in the place where her husband had been buried and therefore to punish the appellant to pay such costs is manifestly excessive and amounts to condemning them yet they had a constitutional right to litigate;
  9. By failing to declare that the property belongs to the plaintiff and permanently barring them from interfering with the land and at the same time failing to grant prayer (a) and (b) of the counterclaim effectively leaves a hollow decision despite the overwhelming evidence by the plaintiff that indeed they are entitled to the land and therefore the whole of the decision is unbalanced and biased against the plaintiff;
  10. The learned Magistrate erred by failing to consider the evidence, submissions and authorities binding upon the court;
  11. The learned Magistrate's decision was plainly wrong in law and principle.
2. The Appellant therefore prays: -
- a. The appeal herein be allowed;
  - b. The judgment and order of the J M Kituku (SPM) delivered and/or given on the 19/12/2023 and all consequential orders be set aside and the plaintiff's suit be allowed with costs to the appellant;
  - c. Costs of this appeal be provided for.
3. The memorandum of appeal was canvassed by way of written submissions.



## Appellant's Submissions

4. The appellant, who was the plaintiff before the trial court, submitted that the learned trial Magistrate erred in law and fact by granting orders in favour of the respondents despite overwhelming evidence that the respondents were merely temporary licensees on the suit land. The appellant contended that the suit land known as Plot No. 111 Tezo/Roka Settlement Scheme originally belonged to his late father, Mzee Chilango Mwagambo Kiti (deceased), who cleared the bushes and settled thereon but later relocated to a nearby plot while continuing to cultivate on the suit property. It was the appellant's case that the respondents' father was allowed to stay on the land temporarily and on humanitarian grounds due to a distant family relation.
5. The appellant asserted that upon the demise of both his father and the respondents' father, the respondents breached the conditions of their temporary stay by cultivating permanent crops such as coconut and cashew nut trees, which necessitated intervention by the area chief. The appellant emphasized that even the respondents' father was not buried on the suit land, which indicated a mutual understanding that the land did not belong to him. He further submitted that the conduct of the respondents, including their attempts to bury their late mother Fatuma Karisa Haro on the suit land, triggered the suit in the lower court.
6. The appellant disputed the respondents' defence and counterclaim, which asserted beneficial ownership and extinguishment of the appellant's rights by operation of law. The appellant argued that the learned trial Magistrate erred by granting prayers (c) and (d) of the counterclaim, which effectively awarded the respondents permanent injunctive relief and burial-related costs, despite having not granted declaratory reliefs on ownership or extinguishment of rights.
7. It was submitted that the appellant presented sufficient evidence through witnesses PW1, PW2, and PW3, all of whom consistently stated that the respondents' stay was conditional and temporary. PW2 testified that she was present when the respondents' father was granted permission to stay on the land, and PW3, a former assistant chief, confirmed the historical arrangement and efforts to have the respondents vacate the land as early as 1996–2005. The appellant maintained that such actions negated any claim of peaceful and uninterrupted occupation.
8. The appellant faulted the trial court for ignoring the lack of proof of ownership by the respondents and for relying on letters from chiefs and the Land Adjudication Office that were inconsistent, lacked probative value, and were not corroborated by live testimony from the makers. The appellant submitted that the trial Magistrate erred in holding that the appellant's claim had been extinguished by operation of law, despite the respondents not pleading adverse possession, and the court lacking jurisdiction under Section 38 of the *Limitation of Actions Act* to determine such a claim.
9. It was further submitted that the respondents' documentary evidence was riddled with inconsistencies on the alleged year of settlement (ranging from 1955, 1963, 1965, 1970 to 1975), the number of family members, and the applicable settlement scheme. The appellant contended that such inconsistencies rendered the documents unreliable. The appellant also submitted that the learned trial Magistrate misconstrued the nature of the dispute, failed to appreciate the genesis of the respondents' occupation, and overlooked the fact that the suit was essentially a burial dispute that was converted into a land dispute without due cause.
10. Lastly, the appellant faulted the award of burial-related costs amounting to Kshs. 7,500 and Kshs. 500 per day from 26/10/2021, submitting that it unfairly punished the appellant for exercising his constitutional right to litigate. It was argued that the respondents had alternative burial grounds and



chose to escalate the matter unnecessarily. The appellant thus urged the court to allow the appeal with costs and set aside the trial court's judgment.

11. The Appellant relied on the cases of *Peter Karong'a Kuria v Margaret Wairimu Kimani* (2015) eKLR; *Dr Joseph N.K Arap Ng'ok v Justice Moiyo Ole Keiwua and 4 Others* (1997) eKLR Civil Application No Nai 60 of 1997; *Giella v Cassman Brown* 1963 EA; and *Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiruti & 4 Others* NRB Civil Appeal No E141 OF 2022 eKLR.

### **Respondents' Submissions**

12. The respondents, who were the defendants before the trial court, supported the judgment delivered by the learned trial Magistrate and urged the court to dismiss the appeal. They submitted that the Memorandum of Appeal raised no substantive error and that the court correctly evaluated the evidence on record.
13. In response to ground 1 of the appeal, the respondents maintained that they had been in continuous, peaceful, and uninterrupted possession, occupation, and use of the suit property for a period exceeding 19 years, from 2002 until 2021, when the burial of their late mother Fatuma Karisa Haro was contested. They relied on the trial court's finding in paragraphs 30 and 31 of the judgment which confirmed their long-standing occupation. They further submitted that this occupation was corroborated by official documentation from the Land Adjudication and Settlement Office and various local administrators, which showed that their parents had occupied the land since the 1960s or 1970s.
14. On grounds two and six, the respondents submitted that the appellant had failed to produce any letter of allotment or official documentation proving ownership of the land by his father. The mere assertion that the respondents' father was allowed to stay temporarily was unsupported by any documentary evidence. They argued that the court properly found that the appellant had not discharged the burden of proof and that the appellant's claim was therefore correctly dismissed.
15. As to grounds 3 and 4, the respondents submitted that the trial Magistrate did not err in awarding a permanent injunction. They maintained that prayer (c) of their counterclaim, which sought protection from interference with their possession, was properly granted in light of their long-standing occupation. The injunction was a fair equitable remedy supported by evidence, and the trial court had not misapplied the principles of law governing such reliefs.
16. Regarding ground 5, the respondents submitted that the trial court had carefully considered all the evidence before it and found that the respondents' use and occupation of the land was longstanding, and not based on permission or license from the appellant's family. They emphasized that the occupation stemmed from their parents' own actions and development of the land.
17. In respect to ground 7, the respondents contended that the fact that the deceased's husband was buried elsewhere was irrelevant to the issues at hand and could not be a basis for denying the respondents use of the suit property.
18. On ground 8, the respondents supported the award of Kshs. 7,500 and Kshs. 500 per day from 26/10/2021, submitting that it was the appellant's actions, including seeking and obtaining injunctive relief, that directly caused the burial delay. The court was right to compensate them for the resulting mortuary expenses.
19. Responding to ground 9, the respondents noted that the appellant did not seek a declaratory order regarding ownership, and similarly, the trial court declined to grant such relief to the respondents. Nonetheless, the permanent injunction was grounded in the facts of possession and use, and not



in legal ownership. They rejected the appellant's characterization of the judgment as biased or contradictory.

20. Regarding grounds 10 and 11, the respondents submitted that the learned trial Magistrate considered all relevant authorities and did not make a determination based on adverse possession. The judgment was grounded solely on the evidence and pleadings, and no misapprehension of law was demonstrated.
21. In conclusion, the respondents submitted that the appeal lacked merit and should be dismissed with costs, as the trial court had correctly assessed the evidence, addressed the issues raised, and reached a just and fair conclusion.
22. This being a first appeal, I am mindful that the duty of this court as set out in the decision of *Selle & Another versus Associated Motor Boat Co. Ltd & Others* (1968) EA 123 is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in *Jabane versus Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another versus Shab* (1968) EA 93.
23. It is therefore necessary at this point to set out the nature of the claim before the trial court. The Appellant commenced the suit by way of a plaint dated 23/3/2022, wherein he sought, inter alia, a permanent injunction to restrain the Respondents, their agents, servants, and anyone claiming under them from trespassing upon the parcel of land known as Plot No. 111, Tezo/Roka Settlement Scheme, measuring approximately twelve (12) acres. The Appellant further prayed for an order to restrain the Respondents from interring the remains of one Fatuma Karisa Hare on the said land, a declaration that the suit property belongs to him, as well as costs of the suit and interest thereon.
24. In the Plaint, the Appellant averred that the suit property was allotted to his late father, Chilango Mwagambo Mwakiti, in or about the year 1970. It was his case that during his lifetime, the deceased permitted the Respondents' parents to reside temporarily on the suit land, on the express condition that they would not erect permanent structures or plant permanent crops or trees thereon. However, following the demise of his father, the Respondents allegedly began to contravene those conditions, prompting the Appellant to demand that they vacate the premises. The Respondents allegedly refused to do so, necessitating the intervention of the local area chief. Despite such intervention, the Respondents remained on the land. At the time of instituting the suit, the Appellant contended that the Respondents had gone further to excavate a grave on the property with the intention of burying their late mother, one Fatuma Karisa Hare.
25. The Respondents entered appearance and filed a Statement of Defence and Counterclaim dated 25/3/2022. In their Defence, they denied the allegations set out in the Plaint and averred that the late Fatuma Karisa Hare was the beneficial owner of the suit property, having occupied and possessed the same continuously from the 1970s until her demise on 26/10/2021. They asserted that the Appellant holds no legal or equitable interest in the suit property, and further denied ever attending any meeting at the Chief's office concerning the land. In their Counterclaim, the Respondents sought the following reliefs:
  - a. A declaration that the Plaintiffs in the counter-claim are the beneficial owners of the suit property plot no. 111 Tezo/Roka Settlement Scheme;
  - b. A declaration that the interest if any of the Defendant in the counter-claim or his father and his agents or servants or employees or hirelings or any one claiming under the defendant in the counter-claim or his father is extinguished by operation of land;



- c. A permanent injunction against the defendant in the counter-claim, his agents, or servants or employees or hirelings or anyone claiming under the defendant in the counter-claim from interfering with peaceful possession, occupation and use of the suit property by the Plaintiffs in the counter-claim;
  - d. Kshs. 7,500 and Kshs. 500 per day from 26/10/2021 up to when the body will be released to the Plaintiffs in the counterclaim as pleaded in paragraph 21;
  - e. General and exemplary damages for stopping the burial of the late Fatuma Karisa Hare;
  - f. The Plaintiff/defendant in the counter-claim be condemned to pay costs of the suit and interest on costs and the sum awarded for general and/or exemplary.
26. The Appellant filed a reply to the defence and counterclaim dated 20/6/2023, wherein he denied the contents of the defence and counterclaim.
27. The matter proceeded to full hearing during which the Appellant testified and called a total of 3 witnesses. Nelson Gambo Mwangambo (PW1), the Appellant, adopted his witness statement filed on 23/3/2022 as his evidence-in-chief. He further produced the documents listed in his List of Documents dated 23/3/2022 as Plaintiff's Exhibits 1 to 3 (PEXH 1-3). Upon cross-examination, he conceded that his late father never instituted any proceedings against the Respondents during his lifetime. He also confirmed that he has no developments or structures on the suit property. Notably, he testified that the Respondents have been in occupation of the suit property since 1982 and that the dispute only arose approximately three years after his father's demise in 1985.
28. Sada Nyale Chilango (PW2) similarly adopted her witness statement dated 23rd March 2022 as her evidence-in-chief. In cross-examination, she informed the court that she is the widow of one of the sons of the deceased, Chilango Mwangambo Mwakiti. She confirmed that the Respondents reside on the suit property, although she asserted that their father never lived thereon. She further stated that the Respondents have resided on the suit property since birth.
29. Stanlous Nyale Kithi (PW3) equally adopted his witness statement dated 23/3/2022 as his evidence-in-chief. He testified that he resides in Zoerani area and served as the Assistant Chief of Zoerani Sub-Location. During cross-examination, he informed the court that he had previously intervened in the dispute between the parties, although he did not have any minutes or documentary record of such engagement. He confirmed that the Respondents' family resides on the suit property and stated that, at some point, the Appellant's siblings burned down the Respondents' house. In re-examination, he stated that the deceased had permitted the Respondents to reside on the suit property.
30. The Respondents called two witnesses. Chilango Karisa Haro (DW1), the 1<sup>st</sup> Respondent, adopted his witness statement dated 25/3/2022 as his evidence-in-chief. During cross-examination, he testified that his house, which was situated on the suit property, had been burnt down and although he did not press any criminal charges against the alleged perpetrators, he reported the matter to the police. He further stated that their first-born sibling, one Kadzo, had been interred on the suit property, although their father had been buried at his maternal home in Tezo. DW1 also informed the court that his late mother had not obtained a title deed for the suit property because she was allegedly required to pay Kshs. 300,000, which she could not afford. He concluded his testimony by stating that, according to his late mother, it was in fact his father who had permitted the Appellant to utilize the land, and not the other way around.
31. Harrison Mbaru Kalama (DW2), the second witness for the Respondents, similarly adopted his witness statement dated 25/3/2022 as his evidence-in-chief. In cross-examination, DW2 informed the



court that he was born in 1949 and that he had become a neighbour to the 1<sup>st</sup> Respondent upon settling on his own parcel of land in the year 1978. He further testified that, by the time he relocated to the area, the parents of the Respondents were already residing on the suit property.

Upon considering the pleadings, evidence adduced, and submissions by both parties, the trial court delivered its judgment on 19/12/2023. The learned trial Magistrate found that the Appellant had failed to discharge the burden of proof to the requisite standard, namely, on a balance of probabilities, and consequently dismissed the Appellant's suit with costs. In addressing the Respondents' counterclaim, the learned Magistrate declined to award damages but allowed certain prayers therein, stating as follows with respect to the remaining reliefs sought: "45. on the counter-claim, the area has to be adjudicated and the procedure set out in the adjudication not followed. As such I am unable to grant prayer (a) and (b). however, I give prayers (c) (d). I also award costs and interests from the date of judgment until payment in full."

32. It is this judgment that is the subject of this appeal. Therefore, having considered the record, submissions, and the applicable law, the following issues arise for determination:

- i) Whether the learned Magistrate erred in law and fact in finding that the Respondents were in continuous, peaceful and uninterrupted occupation of the suit land; ii. Whether the trial court erred in granting a permanent injunction in favour of the Respondents and awarding mortuary- related compensation; iii. Whether the trial court correctly dismissed the Appellant's claim for ownership and injunctive relief;
- iv. Whether the trial court misapprehended the law or misapplied legal principles in rendering its judgment.

33. It is trite law that he who alleges must prove. Section 107(1) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

34. The trial court found that the Respondents had been in possession and occupation of the suit land. This was corroborated by evidence from DW1 and DW2, who both stated that the Respondents' parents resided on the land as early as the 1970s, a fact further supported by letters from local administrators, the area chief, and the Land Adjudication Office, Kilifi (letter dated 13/3/2018 and 30/11/2021). While the Appellant contested this occupation as being permissive and temporary, he did not tender any documentary evidence such as an allotment letter, title deed, or a formal agreement to establish his claim to the land or the terms of the alleged license.

35. Notably, PW1 admitted under cross-examination that the Respondents had been in occupation of the land since 1982 and that no action was taken by his father during his lifetime, nor was any formal notice to vacate produced. The prolonged possession for nearly 4 decades militates against the claim that the occupation was strictly temporary. The Appellant's reliance on oral history and uncorroborated claims of "conditional permission" was rightly treated with caution by the trial court.

36. I have indeed keenly perused the judgment of the trial court, and I find no indication whatsoever that the learned Magistrate made her determination based on the doctrine of adverse possession. While the Respondents made broad references to longstanding occupation and user of the suit land, they neither pleaded nor invoked adverse possession within the confines of Section 38 of the *Limitation of Actions Act*, nor did they move the court in the prescribed manner through an originating summons. The trial Magistrate expressly declined to grant declaratory reliefs relating to ownership or extinguishment of title by operation of law, as seen at paragraph 45 of the impugned judgment. The Appellant's



contention that the trial court's decision was rooted in the doctrine of adverse possession is, therefore, misguided and unfounded. The decision appears to have been grounded solely on possession and the equitable consideration that the Respondents had established a longstanding presence on the land, rather than on any legal doctrine extinguishing title.

37. The trial court granted a permanent injunction barring the Appellant and his agents from interfering with the Respondents' possession, occupation and use of the suit land. This relief was grounded in prayer (c) of the Respondents' counterclaim. The trial Magistrate, having found that the Respondents had been in occupation of the land for a significant period of time, was justified in issuing injunctive relief to preserve that status quo. The Appellant's claim for ownership had failed, and no superior claim to possession was demonstrated.
38. With respect to the award of Kshs. 7,500 and Kshs. 500 per day from 26/10/2021 to the date of release of the deceased's (Fatuma Hare) body, I respectfully disagree with the trial court. These sums, in my view, constitute special damages, which the law requires to be specifically pleaded and strictly proved. From the record, the Respondents pleaded the amounts under paragraph 21 of their counterclaim and included them in prayer (d). However, no receipts or documentary evidence were adduced before the trial court to prove actual payment of the mortuary fees or the daily charges claimed. The mere pleading or oral assertion of expense, without proof by way of receipts or invoices, is insufficient. In the absence of such proof, the award was unjustified and ought not to have been granted. Consequently, I find that the trial court erred in awarding Kshs. 7,500 and Kshs. 500 per day in the absence of strict proof, and the same must be set aside.
39. On whether the Appellant established ownership, it is clear that the Appellant's claim was anchored on alleged allotment of the land to his father in 1970. However, no letter of allotment, official correspondence or map from the Land Adjudication Office was produced to support this assertion. In the absence of registration or allotment documentation, the Appellant's claim of legal ownership was speculative. The trial court was therefore right in finding that the Appellant had not discharged the burden of proof under Sections 107 and 109 of the *Evidence Act*.
40. The Appellant further alleged that the trial Magistrate misapplied the law, particularly in relation to adverse possession and equitable remedies. However, a careful reading of the judgment shows that the trial court did not base its decision on adverse possession. On the contrary, the court declined to grant a declaration of extinguishment of title (prayer b of the counterclaim) precisely because of adjudication processes yet to be completed. The injunction was based on proven possession, not ownership. The court applied sound equitable principles to protect longstanding occupation and prevent unnecessary disruption.
41. For the foregoing reasons, I grant the following reliefs: -
  - a) The appeal partly succeeds to the extent that the award of Kshs. 7,500 and Kshs. 500 per day from 26/10/2021 is hereby set aside;
  - b) The remainder of the judgment and orders of Hon. J.M. Kituku (SPM) delivered on 19/12/2023 in Kilifi SPMCC ELC No. E034 of 2022 are upheld;
  - c) Each party shall bear their own costs of this appeal, considering the partial success on the issue of special damages.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**MWANGI NJOROGE**



**JUDGE, ELC, MALINDI.**

